THE LAW OF THE SEA AND THE GREAT WAR.*

OUR part in the war before entering it as a combatant had been in controversy with Great Britain and Allies, with Holland, and with the Imperial German Government.

Notwithstanding the intense sympathy of a large majority of our people with the Entente cause, our duties as a neutral before entering the war required that we demand the rights of a neutral under international law. Upon our entering the war our quarrel with the Entente, of course, vanished, and even previously we were always at a disadvantage in controversy with them for they were fighting a cause so clearly our own that we afterward adopted it. Furthermore, we were greatly handicapped in our dispute with them by their continual discovery of artifices perpetrated by our shippers in attempts to furnish Germany with articles contraband. It was the right of such shippers to make the attempt to land their goods in Germany, taking the chances of success or loss, and of the Entente Allies to prevent its success if possible. Our controversy with the entente Allies was twofold:

First: Over the right they claimed to intercept our shipments to Germany or to a neutral *en route* to Germany, and

Secondly: To intercept and censor our mails.

(1.) Interception of Neutral Goods.

The right to interrupt a shipment of contraband, absolute or conditional, and to search, and if justifiable seize, a cargo was an ancient and indisputable right existing to different extents in different ages. The *Consulat de la Maer or Consulato del Mare* dating from the 14th century, is said to be the oldest code surviving.[1] The rules of this code were that

a. Enemy goods on the ship of a friend are good prize.

*Address of Edmund F. Trabue before the Louisiana Bar Association, May 17, 1919.

[1] *Graham Bower*, Am. Journ. Int. Law, Vol. 13, No. 1, Jan. 1919, p. 63.

b. In such case the captain of the neutral ship should be paid freight for his cargo so confiscated as if he had taken it to its primitive destination.

c. The property of a friend on an enemy vessel is free.

d. The captors who have seized an enemy vessel and brought it into one of their ports should be paid freight on the neutral merchandise as if it had been carried to its primitive destination.

The French regulations of 1744 and British Mem. of 1753 [2] brought the law of capture at sea to principles remarkably like those we treat as ruling today, so, we see that the law on the subject is the growth of ancient rules modified by common consent, or by treaty, according to the requirements of the times; but it is *law* as opposed to *anarchy* or *barbarism*. In the Seven Years War the so-called rule of 1756 was announced.[3] No state then allowed any but its own ships to trade with its colonies, but France was unable because of the British Navy to carry on such trade, and opened it to the Dutch. The British thereupon ordered that all neutral ships laden with cargoes from the colonies should be captured and brought before the prize courts, and many were seized. The ground was that the neutrals had no right to enjoy a trade closed to them in time of peace and thus assist one belligerent by adding its merchantmen to that belligerent's shipping.

The seizure was regular, the merchantmen being warned to stop and being visited and searched and sent to a British port in charge of a prize crew. The rule forbade such prizes being destroyed. Resentment against the British acts was one of the causes which led the Northern powers to combine against her and formed the league known as the Armed Neutrality of 1780.[4] Private property belonging to a belligerent's subjects when found on neutral ships was treated as subject to capture till the middle of the 17th century, when the Dutch asserted the doctrine that a belligerent's subjects' property on neutral ships could not be captured. This doctrine was expressed ac-

[2] 53 AM. LAW REV. 33.
[3] Am. Journ. Int. Law, Vol. 9, No. 2, July, 1915, p. 584.
[4] Omond, p. 8.

cording to the formula "Free ships, free goods." The theory invoked was that the ship was part of a neutral country afloat, and that a belligerent might not invade it and confiscate his enemy's property. Frederick the Great in 1752 invoked this doctrine but afterward receded and recognized the British doctrine previously obtaining.[5] The doctrine "Free ships, free goods," was never generally adopted.

Essentially real freedom of navigation during the 18th century did not exist.[6] The rule of 1756 received new impetus at the outbreak of the war of 1793 owing to a neutral protest against Great Britain's prohibition of trade with her enemies' colonies. The British proclamation forbade vessels carrying the French West Indian products to Europe, but was silent as to a neutral vessel's sailing from Europe to the French colonies, and traffic between the West Indian Islands and the United States. A relaxation of the rule of 1756 was made by the British order of January, 1798, as to trading vessels laden with produce of French, Spanish or Dutch settlements brought in for adjudication when bound to a European port not a port of Great Britain, nor of the neutral to which the vessel belonged. When neutrals saw that they might carry from hostile colonies to England or to their own ports they endeavored to find a way of unqualified trade with the colonies, and to carry between the colonies and mother country where better prices could be secured; so they began to carry to their own ports and re-export to a belligerent port. Hence the germ of continuous voyage.[7] United States vessels were peculiarly favored for adopting this plan when desiring to carry from French, Spanish or Dutch colonies to their respective mother countries during the war between England on one hand and France, Spain and Holland on the other so far as the trade related to colonies in the new world.[8] This scheme frustrated England's purposes. Accordingly, she attempted to insert in the Jay Treaty a provision

[5] Omond, p. 10.

[6] *Harmodio Arias*, Am. Jour. Int. Law, Vol. 9, No. 3, July, 1915, p. 583.

[7] See further *Lord Justice Kennedy*, Rep. Int. Law Asso. 550, 1908, p. 41; citing Westlake, p. 255.

[8] Arias, 587, citing Wharton, 3383.

against the trade, and it was stipulated in the project of the treaty that West Indian products imported into the United States should not be re-exported during hostilities; but this article was excluded when the Treaty was ratified. At the close of the 18th century numerous cases arose involving the doctrine of continuous voyage.

International law was recognized by us even before adoption of our Federal Constitution, and by the Ordinance of December 4, 1781, concerning marine captures we professed obedience to international law "according to the general usages of Europe." [9]

The rule of the *Consulato del Mare,* hereinbefore mentioned, was apparently recognized by our judiciary at the outset as embodying the rule of capture at sea [10] and Mr. Jefferson's statement to M. Genet is called a classic.[11]

Early in our history we protested against the Treaty of 1691 between England and Sweden constituting money, provisions, horses and their accoutrement contraband, and Denmark joined in this protest. The controversy thus arising was settled by the Jay Treaty, 1794, concluded by Washington, Jay, Pitt and Lord Grenville specifying absolute contraband, and reciting the difficulty of defining conditional contraband, and providing that whenever any articles so becoming contraband according to the existing laws of nations should be for that reason seized they should not be confiscated, but their owners speedily and completely indemnified; and the captors or, in their default, the government under whose authority they acted should pay the masters or owners of the vessel carrying them the full value of all such articles with a reasonable mercantile profit thereon, together with the freight and demurrage.

In 1803 a treaty was made between Great Britain and Sweden which also provided for preëmption rather than confiscation, and these two treaties would seem to establish the doctrine of

[9] *Hannis Taylor,* Int. Pub. Law, § 103, p. 136; *Graham Bower,* 53 AM. LAW REV. 29.

[10] Taylor, § 650, p. 715, citing The Nereide, 9 Cr. 418.

[11] *H. S. Quigley,* Am. Journ. Int. Law, Vol. 11, p. 825. See also 39 Am. St. Pap. For. Rel. I., pp. 166, 7; KENT. COM., 8th ed., p. 126.

preëmption as affecting Great Britain. Lord Stowell in The Haabet,[12] announced the doctrine as "a mere mitigated practice" prevailing "in later times."

Great Britain's maritime code was suddenly relaxed in the interest of neutral trade in the war of 1854-6.[13] Hitherto a neutral could not by his flag protect a belligerent's property. The Armed Neutralities of 1780 and 1800 had failed to shake the rule of 1756 and the doctrine of continuous voyage which had been elaborated in defiance of the rule; but Lord Clarendon, Secretary of Foreign Affairs, when the Russian war began in 1854, had resolved to change the rules of naval warfare, and addressed himself privately to France and the United States suggesting the abolition of privateering, and other reforms, and that the great maritime powers had a right to effect the change in the interest of humanity. There were, however, differences of opinion in the Cabinet. Lord Clarendon said:[14] "Her Majesty will waive the right to seizing enemy's property laden on board neutral vessels, unless it be contraband."

The Treaty of Paris was signed March 30, 1856, but contained no article dealing with maritime law, and Count Walewski proposed that the plenipotentiaries should before separating make a declaration constituting a remarkable advance in internationl law. The Declaration of Paris was signed April 16th providing:

> "(a) privateering is and remains abolished, (b) the neutral flag covers enemy goods except contraband of war, (c) neutral goods except contraband are not liable to capture under an enemy's flag, (d) blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy."

Thus Great Britain abandoned the right to capture enemy property in the ship of a neutral.

The Declaration was signed by Great Britain, France, Russia, Turkey, Sardinia, Austria and Prussia, and afterward acceded to by other powers, but the United States declined to sign

[12] 2 C. Rob. 174, 1 Roscoe's Prize Cases 212, 214.
[13] Omond, p. 40.
[14] Omond, p. 43; Taylor, p. 722.

it, presumptively, says Omond, because if privateering was abolished nations having powerful fleets would have the advantage, but offered to accede to the Declaration if capture of private property at sea, when not contraband, was altogether forbidden. Our proposition was declined, so the Declaration applied only to its signers, and our ships when neutral could not carry enemy goods except at risk of capture.

Taylor, however, says as to our reason for refusal to sign the Declaration, that it was because it failed "completely to embody" the aspiration of our appeal of 1823.

So many articles had become conditional contraband that the British Foreign Office instructed Sir Edward Fry, delegate to the Second Hague Conference (1907) that the old rules of contraband were no longer satisfactory under changed conditions, and Great Britain was ready, instead of trying to frame more satisfactory rules for prevention of contraband trade to abandon the principle of contraband altogether, allowing free trade in neutral vessels between belligerents and neutrals to continue during war without restriction, subject only to its exclusion by blockade of an enemy's port; and she declared it to be the common interest of all nations to adopt such course. The British proposal was not accepted by the Conference.

In 1907 Sir Edward Gray informed Sir Edward Fry that Great Britain might even benefit by the adoption of the principle of immunity from capture.[15] This surpassed the Declaration of Paris which provided that the neutral flag might protect enemy goods except contraband; and now Britain was to abandon contraband altogether, and proposed that neutral merchantmen be free to trade with belligerents without restriction except exclusion from blockaded ports. The House of Lords vetoed the proposal of the Foreign Office to the salvation of the Entente and undoing of Germany in the Great War of 1914.[16]

Admiral Mahan says:[17]

> "That arch robber, the first Napoleon, who so remorselessly and exhaustively carried the principle of war sustaining war to its utmost logical sequence, and even in peace scru-

[15] Bower 74; Cababe, p. 63. [16] Omond, p. 55.
[17] Am. Jour. Int. Law, Vol. 13, No. 1, Jan., 1919, p. 63.

> pled not to quarter his arms on subject countries, maintaining them on what after all was private property of foreigners, even he waxes eloquent, and superficially most convincing as he compares the seizure of goods at sea, so fatal to his empire, to the seizure of a wagon traveling on a country road * * *."

Bower suggests that the Kaiser had the same objection to the seizure of goods at sea as had Napoleon, and for similar reason.

One proposal of the last Hague Convention was an international prize court, but inasmuch as the judges might not be able to determine what were the general principles of "equity and justice" which were to govern such court, and there were many differences of opinion as to what rules of law could be held generally recognized [18] it was deemed necessary to prepare a code of maritime law for the court. For that purpose a naval conference, attended by delegates of Great Britain, France, Germany, Russia, Italy, Spain, Holland, Japan and the United States met December 4, 1908, at the London Foreign Office. In three months they had compiled the "Declaration concerning the laws of Naval War," now known as "The Declaration of London." It was signed Feb. 26, 1909, and covered almost the entire field of law affecting neutral merchant shipping, e. g. contraband and blockade.

There was great difference of opinion regarding the Declaration and the naval prize bill providing procedure on appeals to the international court from the British courts in prize cases, and the Naval Practices Bill was withdrawn in November, 1910, but afterward brought in again and passed by the Commons on December 7, 1911, and rejected by the Lords December 12, 1911. Thus fell "The Declaration of London" and the International Prize Court.[19]

The Declaration of London, Article 22,[20] defined absolute contraband, and Article 24 defined conditional contraband; and Article 23 provided that other objects "exclusively used for war" might be added upon notice to the list of absolute contra-

[18] Omond, 53.

[19] Omond, 55.

[20] 8 Am. Journ. Int. Law, No. 2, April, 1914, pp. 307, *et seq.*; Omond, pp. 61 *et seq.*

band, and Article 25 that other articles "susceptible of use in war" might be added upon notice to the list of conditional contraband. The lists of contraband set out in Articles 22 and 24 were to exist in the absence of notice and be regarded as a complete enumeration.

In the absence of the "Declaration of London" there is doubt as to the right to enlarge the list of contraband.[21]

The British members of the London Conference had proposed a free list because it would place the matter beyond the power of belligerents thereafter to treat as contraband the raw materials of some of the most important British national interests along with harmless articles.

By the Declaration of London the doctrine of continuous voyage could not be applied to articles of conditional contraband.[22] They were subject to capture only if their destination for enemy's armed forces or government department was proved, and such destination was to be presumed only if the goods were traced to enemy's authorities, or to some man of business who as a matter of common knowledge, supplied articles of the same kind to the enemy, to a fortified place belonging to him, or to a base for his armed forces. In the absence of these presumptions the neutral ship's destination was presumed innocent, and her papers were to be taken as proof both as to her voyage and the port of discharge of her cargo, unless she was clearly outside her proper course and unable to explain the circumstances. The Declaration of London was not adopted by Great Britain, but a Royal Proclamation on August 5, 1914, announced articles which she would treat as contraband, and they corresponded to those of the Declaration of London; and by order in Council, August 20, 1914, it was announced that the Declaration of London would be put in force subject to certain alterations.

Under the London Declaration the destination of contraband was to be presumed from the position of the consignee or character of the "place of destination," but now the destination might be proved by any sufficient evidence. Under the former, conditional contraband was not liable to capture except on

[21] Taylor, p. 739.

[22] Omond, 61.

board a ship bound to an enemy country or its armed forces, and when not to be discharged at an intervening port, but now it could be captured at whatever port it was to be discharged.

Rubber, copper and metallic ores then on the free list were made conditional contraband, and on October 29, 1914, were made absolute contraband. From month to month fresh orders were made and more articles declared contraband. The Foreign Office had, on January 7th, 1915, declared that cotton was on the free list and that it was His Majesty's intention to keep it there; but on August 20, 1915, raw cotton and other articles were made absolute contraband, the German Government meanwhile, February 4th, 1915, having made its famous declaration that the English Channel and North and West Coasts of France were a war zone and that all enemy ships found in that area would be destroyed, and that neutral ships *might* be exposed to danger.

In the controversy between the Entente Allies and the United States it will be seen that they were at great disadvantage, for while we, notwithstanding we waived it in some treaties, had since the time of Benjamin Franklin, clamored for immunity of private property, even of enemy ownership, from seizure, Great Britain had wavered between the extremely harsh doctrine of earlier times and the radically liberal doctrine proposed by her at the Hague Conference, 1907, and the London Naval Conference, 1909. Whatever, therefore, her provocation by reason of the acts of Germany, or her right of retaliation upon Germany, the United States had some advantage over the Entente Allies in the controversies between them over the seizure of our ships or cargoes, and our mails. Our disadvantage was that as a neutral we were forced to protect a trade with the Teutonic powers who were waging a war for the subjugation of all other countries, and the Entente Allies alone were opposing their audacious ambitions.

The Entente Allies were not bound by the Declaration of London, and, as above appears, had the right even by that Declaration to add upon notice to the lists of contraband, and the United States had not accepted the Declaration of Paris.[23]

[23] Taylor, p. 723.

The Allies would, therefore, seem to have had the right under the Declaration to rescind their Orders in Council upon the same authority as that under which they made them, except to the extent forbidden by international law, as then understood, of treating harmless articles as noncontraband. The controversy, however, between us and the Entente Allies was waged largely after Great Britain in retaliation for the Teutonic Declaration of February 4, 1915, of a war zone covering the British Channel and parts of the French coast, had virtually declared all commerce with the Teutonic powers contraband and their ports all blockaded.

Indeed, the Entente Allies did not in their correspondence with us controvert our claims as to what was international law on the subject of contraband, although not entirely admitting our position as to blockade, but they justified their embargo on commerce with the Teutonic Allies upon the ground of retaliation for the intolerable proclamation of the war zone made by the Teutons, and upon the existence of the many devices concocted by our shippers to smuggle into Germany goods of divers kinds, some even absolute contraband.

Probably the surest ground upon which we stood was expounded by Mr. Lansing to Ambassador Page in his letter of October 21, 1915, in which he controverted the right of the Entente Allies to seize our vessels, or our goods, and take them to Entente ports for examination, and even at the expense of our shippers, with no excuse except that fraud had been practiced by American shippers and that goods contraband were continually pouring into Germany.

The Entente's position was that a presumption of illegality in neutral commerce had arisen from the circumstances just mentioned, and that the source of proof of the illegality was immaterial, but our response was that not only must the individual cases of certain shippers be considered, but also the indirect injury to all our trade, and that through the course pursued by the Entente Allies our foreign trade, innocent as well as illegal was suffering; and that the prize courts of the Entente Allies had no jurisdiction by virtue solely of their Orders in Council, but could derive jurisdiction only from inter-

national law, and that by such law the prize courts of belligerents were given jurisdiction only when visit and search disclosed from the cargo, or the ship's papers, sufficient evidence to indicate the presence of contraband, or that the vessel was bound for breaking a legitimate blockade.[24]

We further contended that even Orders in Council could not confer jurisdiction on the Entente's prize courts of the cases of vessels sailing the seas except in accordance with international law, because no government had the authority to make international law without the concurrence of other governments, and that such Orders in Council were *bruta fulmina.* On these points Mr. Lansing seems to have been incontrovertible, for the neutral government was certainly as powerful to declare the adverse doctrine as one of the Entente Allies was to declare the doctrine by us assailed. The Entente's advantage, however, was,

First, In the claim that Germany's declaration of the war zone was an infringement of neutral rights so much greater than was the Entente blockade that the failure to contest it licensed the Entente to retaliate without regard to the rights of the indulgent neutrals, and

Secondly, That while the Teutonic Allies outraged all neutral rights, not only of property but life itself, the Entente Allies only met by retaliation the illegal acts of the Teutons, but strictly observed the safety of life and committed as little injury to private property as possible, usually making compensation for the property taken and generally satisfying the owners thereof. Accordingly, Great Britain notified us that she had paid for meats seized on their way to well recognized German agents, and that the cargoes of cotton were seized in accordance with contract effected with the representatives of the cotton owners. She practiced preëmption.

What advantage, therefore, we may have had under strict international law was, through the tact, and moderation of the

[24] Letter of Sec'y of State to Ambassador W. H. Page, Oct. 21, 1915. Diplomatic correspondence continued on Contraband, Supp. Am. Journ. Int. Law October, 1916, Vol. 10, pp. 85 *et seq.*, Items 28, 29.

Entente Allies, and their readiness to compensate for the injury inflicted, offset, if not overcome, and, meanwhile, our controversy with the Teutonic Allies over the submarine atrocities, and the growing appreciation by our people of the designs of Germany and her outrages upon Belgium, France and other European countries overshadowed our quarrel with the Entente Allies until it was superseded by our entrance into the war with them against the Teutons.

(2.) Seizure of Our Mails.

Our controversy over the Entente's interruption of our mails is akin to that just considered concerning merchandise. It involves the parcels-post packages and our foreign correspondence or dispatches.

a. The Entente's position that the parcels-post packages were like ordinary merchandise we had admitted in advance.[25]

Furthermore, the French Ambassador at Washington declared "it has not come to the knowledge of the Allied Governments that any protest touching postal correspondence was ever addressed to the Imperial Government." Some writers declared that where neutrals permit their rights to be ignored by one belligerent they must not discriminate against the other.[26]

b. Although similar, the case of correspondence stands upon grounds somewhat different from that of parcels-post packages. Our course is set forth by letter dated January 4, 1916, from Secretary Lansing to Ambassador Page.[27]

Mr. Lansing complained of the removal by the British of parcels-post mail from Dutch vessels; and of "the entire mails including sealed mails and presumably the American diplomatic and consular pouches from the United States to the Netherlands," December 23, 1915, and December 20, 1915, the latter still held by the British. He denied the right of the British to

[25] October, 1916, Supp. Am. Journ. Int. Law, Vol. 10, Special No., pp. 404, 413.

[26] Omond, pp. 73, 4, citing Manning Com. Law of Nat. Ed. 1875, p. 430.

[27] Supp. Am. Journ. Int. Law, Vol. 10, pp. 404 *et seq.* Special No. Oct., 1916.

seize neutral vessels plying between American and neutral ports "without touching at British ports," to bring them into port, and, while there, to remove or censor mails carried by them. He said modern practice generally recognized that mails were not to be censored, confiscated nor destroyed on the high seas even when carried by belligerent mail ships. That to attain the same end by bringing such mail ships within the British jurisdiction for purposes of search and then subjecting them to local regulations allowing censorship of mails could not be justified on the ground of national jurisdiction.

The response of the Allies was made April 3, 1916, by M. Jusserand, enclosing a MEMORANDUM dated February 15, 1916.

The MEMORANDUM, as to parcels-post, mentioned four hundred revolvers for Germany in one package. As to correspondence it remarked that Germany had not only searched mails but sunk them, together with passengers and crew of the vessels carrying them, and that the neutrals had not protested. He mentioned quantities of rubber found in sealed envelopes and declared that the legal right of belligerents to exercise police powers over vessels was no less with regard to mail-bags than any other cargo, and that so late as 1907 the letters and dispatches themselves could be seized and confiscated.

M. Jusserand recalled that at the Hague Convention in 1907 Germany had urged the inviolability of the mails, and carried the point, upon the claim that war dispatches of real importance were sent by telegraph, intimating, apparently, that her action was in anticipation of smuggling war materials in sealed mails. He concluded: (1) that parcels-post was like other merchandise; (2) that the inviolability of postal correspondence stipulated in the Hague Convention did not impair the Allies' right to visit, and seize merchandise hidden in envelopes in mail-bags; and (3) that the Allies would, "for the present" refrain "on the high seas from seizing and confiscating such correspondence, letters or dispatches, and will insure their speediest possible transmission as soon as the sincerity of their character shall have been ascertained."

In reply, Secretary Lansing wrote the British Ambassador May 24, 1916, that he did not consider that the Postal-Union

Convention of 1906 necessarily applied to the *instant* case, that though admitting genuine correspondence to be inviolable, the Allies proceeded to deprive neutral governments of the benefit of such assurance

> "by seizing and confiscating mail from vessels in port instead of at sea. They compel neutral ships without just cause to enter their own ports, or they induce shipping lines, through some form of duress, to send their mails *via* British ports, or they detain all vessels merely calling at British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails * * * take them to London, where every piece, even though of neutral origin and destination, is opened and critically examined, to determine the 'sincerity of their character' in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination."

He declares that delays for even months thus arise.

Again, Mr. Lansing says that in our opinion, there is

> "no legal distinction between the seizure of the mails at sea, which is announced as abandoned, and their seizure from vessels voluntarily or involuntarily in port."

He further claims that the Allies' methods violate the practice obtaining prior to the Hague Convention, and cites many authorities.

The British Ambassador rejoined October 12, 1916, with a confidential enclosure. He assented to our position regarding the Postal-Union Convention; and contended that the Allies' right of inspection could not be carried on properly at sea; wherefore, the vessels were taken to Allied ports. On our complaint of neutral vessels being taken to Allied ports the Ambassador responds that the Allies

> "have never subjected mails to a different treatment according as they were found on a neutral vessel on the high seas, or on neutral vessels compelled to proceed to an Allied port, they have always acknowledged that visits made in the port after a forced change of course must in this re-

> spect be on the same footing as a visit on the high seas, and the criticism formulated by the Government of the United States does not therefore seem warranted."

He remarks, also, that the vessels voluntarily making Allied ports act without Allied compulsion and cites United States *v.* Diekelman,[28] as holding that merchant ships which spontaneously enter a foreign port thereby come under the laws in force in the port when martial law obtains there; and insists on the right of the port to make sure that the vessels carry nothing inimical to their national defense before granting its clearance.

Regarding the Eleventh Convention of the Hague, 1907, he claims that it refers solely to mails found at sea and is foreign to those on board ships in ports, and, furthermore, notes that the Convention was not ratified by Bulgaria, Italy, Montenegro, Russia, Servia, Turkey, etc., etc., but seems to insist that the Allies have conformed nevertheless to the intentions of the conference and that mails are forwarded as quickly as practicable. The Allies claim to have observed the Hague Convention without admitting its sanction.

Further, the Ambassador claims that no general rule previously prohibited

> "belligerents from exercising on the open seas, as to postal correspondence, the right of supervision, surveillance, visitation, and, the case arising, seizure and confiscation, which International Law confers upon them in the matter of any freight outside of the territorial waters and jurisdiction of the neutral powers."

The ambassador cites the Hague report as to prior practice, namely:

> "the seizure, opening the bags, examination, confiscation if need be, in all cases delay or even loss, are the fate usually awaiting mail bags carried by sea in time of war"

and cites authorities contrary to those invoked by Mr. Lansing. He declares regarding commercial correspondence of no interest affecting the war that the Allies have given instructions to see that it is forwarded with as little delay as possible, as far

[28] 92 U. S. 520.

as practicable on the very ship on which it is found, or by a speedier route; and concludes that should abuses be disclosed to the Allies, they would be ever ready to settle responsibility therefor "in accordance with the principles of law and justice which it never was and is not now their intention to evade."

The foregoing issues make questions very difficult of solution. They involve: (a) the law prior to the Hague Convention of 1907; (b) the construction of that Convention; and (c) the application of the Hague Convention.

Notwithstanding the force of the authorities cited by each side on the practice before the Hague Convention, it is difficult to escape the conclusion that under such practice a belligerent might search neutral vessels if grave suspicion of unneutral service existed. It is said by Cyc:[28]

> "There had been a long controversy as to the right to visit and search mail ships and mails."

Cyc cites The Peterhoff, 5th Wall. 28, and our instructions to our blockading vessels June 29th, 1898, concluding in these words:

> "The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade."

Hannis Taylor says:[29]

> "The fact that the neutral carrier is permitted to convey certain classes of mail matter does not deprive the belligerent of the right to search his mail-bags in order to ascertain whether or not he is engaged in the transportation of noxious despatches."

He quotes our Civil War Regulations that:

> "Public mails of any friendly or neutral power, duly certified or authenticated as such"

found on captured vessels

> "shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their destination. This

[28] 40 Cyc. 345.

[29] § 668, p. 750, 1.

instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals."

He says that in the case of The Peterhoff, when the court ordered the mails opened in the presence of the British Consul, who was requested to select such letters as appeared to him to relate to the cargo and its destination, and then forward the remainder, he refused to comply on the ground that the entire mail should be forwarded unopened; that the United States Attorney was directed to pursue that course notwithstanding there was reason to believe that there were some letters in the pouches containing evidence as to the cargo.

Taylor cites Hall as believing that nothing better can be done than concede immunity to mail bags as a general rule, subject to the belligerent's rights "to examine the bags upon reasonable grounds of suspicion being specifically stated in writing."

In our Spanish War regulations we allowed mail steamers interfered with when there were "the clearest grounds of suspicion of violation of law in respect of contraband or blockade." [30]

In the case of The Panama,[31] although the present question does not arise, the court's declarations seem to indicate that mail might be examined upon just suspicions.

The general subject is discussed in Naval College Suggestions.[32] The discussion of Topic V. is elaborate, is based upon an extensive review of authorities and concludes:

"3. That as the interests of neutrals may be involved in such seizure, the mails should, so far as regular, be forwarded without delay. This refers to belligerent mail vessels.

"5. Innocent neutral vessels carrying mails should be exempt from seizure."

When, therefore, we recall the Hague Conference report, invoked by the British Ambassador as to the former practice, namely,

---

[30] 40 Cyc. 345, n. 21. [31] 176 U. S. 535.

[32] 1904, p. 103, 1905, p. 59, 1903, p. 68, Article 20, Naval War Code, 1900 and 1906, p. 88, Topic V.

"the seizure, opening the bags, examination, confiscation if need be, in all cases delay or even loss, are the fate usually awaiting mail bags carried by sea in time of war,"

it is difficult to escape the conclusion that our case against the Allies could not be made out unless under the Eleventh Hague Convention, 1907.

Our case, however, was not rested by our Secretary of State solely upon that Convention, as above appears. It provides:[33]

"The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay. The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port."

This Convention would seem to sustain our position if in force between Allies and us, and if it applied to vessels touching at Allied ports while remaining there.

We took the position that the Convention was controlling in the controversy, but the Allies avoided taking a decided position on the subject, although intimating that the Convention might not be binding because not ratified by Bulgaria, Italy, Montenegro, Russia, Servia, Turkey, and claiming nevertheless that the Allies had essentially complied with the Convention. The Convention seems to resolve the question in our favor as to vessels cited on the high seas, and it is difficult to understand why we claimed that the Allies had taken to their ports vessels so cited unless such statements were true. The British claims on this point are not satisfactory, because while they declare that they did not treat vessels compelled to enter their ports differently from their treatment of them on the high seas, they admitted that they required such vessels to enter their ports examination because of their inability to make the examination properly at sea. The inviolability of the mails seized upon the high seas would, therefore, seem to have been infringed.

[33] 40 Cyc. 345, n. 22.

The case of examination of neutral mails carried by vessels voluntarily entering British ports seems different from that of such mails seized upon the high seas or forced by the Allies into their ports, and United State *v.* Diekelman,[34] appears to support the British contention on the instant point, and Wildenhus's case,[35] reaffirms the doctrine of the Diekelman case. Unless, therefore, the Hague Convention aforesaid affects the rule of the Diekelman case, the point as to the mails examined in an Allied port on a vessel voluntarily entering it would seem against us. Mr. Lansing, however, declares, as aforesaid, that there is

> "no legal distinction between the seizure of the mails at sea, which is announced as abandoned, and their seizure from vessels voluntarily or involuntarily in port."

If this statement be sound it would seem to rest upon an interpretation of the Hague Convention aforesaid, and a critical examination of that convention and of the discussions upon which it is based would be beyond the scope of this paper.

Our Controversy with Holland.

Our controversy with Holland was sharp and short. Holland wanted our foodstuffs and we were willing to sell, except so as to permit Germany's obtaining them or their equivalent in Dutch products. There were—Dutch vessels lying in New York harbor laden with provisions purchased here, but we declined to permit them to be supplied with bunker coal, or to be so used as to benefit Germany.

Naturally we attempted to reach agreement with Holland for use of the vessels, and Holland probably would have consented had Germany permitted, but such permission was inconsistent with the German policy of destroying the shipping of her enemies, so she refused consent and we seized and used the vessels as permitted by the principle of international law known as *Jus Angaria.*

Accordingly, the President issued his proclamation No. 1436, March 20, 1918,[36] empowering the Secretary of the Navy to

[34] 92 U. S. 520, 525. [35] 120 U. S. 1, 11.

[36] Supp. Am. Journ. Int. Law, Vol. 12, No. 3, 1918, pp. 259, 260.

take over and employ the Netherlands' vessels to be manned, equipped and operated by the Navy and Shipping Board, and on March 28, 1918, the President issued order No. 2825a directing the Secretary of the Treasury to take possession of the furniture, stores, bunker fuel, etc., of the vessels within our jurisdiction. Both orders provided for full compensation to the owners of the vessels in accordance with international law. The President desired the consent of the Dutch Government to our action, and, indeed, that Government seems to have taken the initiative in the negotiations hoping to get an arrangement with the Entente powers whereby food should be obtained from them and carried by Dutch ships to Dutch ports with return Dutch tonnage for the Entente powers. Failing an agreement the President stood upon international law. The ships had lain in the harbor since July 17, while the whole world was short of shipping. They were mostly loaded with grain for Holland when the Allied Armies needed grain, and when an equivalent amount of food or stock feed would go to Germany. After prolonged negotiations, an agreement was apparently reached in January, whereby 150,000 tons of Dutch shipping should be employed at our discretion partly for Belgian relief, partly for Switzerland, on condition that for each vessel for Belgian relief a vessel should leave Holland for the United States. The agreement failed because Germany threatened to destroy the ships leaving Holland, and it was feared would destroy those leaving America.

Our position was thoroughly supported by international law.[37] The Netherlands' Minister for Foreign Affairs reported that his government did not regard it advisable to act without having first consulted Germany, because the limitation imposed upon exports of any supplies of cattle food and fertilizer might make it impossible to obtain an economical arrangement with Germany for the supply to Holland of indispensable goods such as coal, etc.; and because by closing the free channel in the North Sea Germany might render impossible the proposed agreement; that Germany claimed that by consenting she would be playing into the hands of the enemy, etc.

[37] 12 Am. Journ. Int. Law, April 2, 1918, pp. 340, *et seq.*

President Wilson said concerning the Dutch proposal made to put the idle Dutch tonnage into service, that the proposal was accepted by us and that on January 25, 1918, the Dutch Minister handed to the Secretary of State a note expressing the terms of the temporary chartering agreement and his government's acceptance thereof, providing as hereinbefore indicated. The President said, however, that the Dutch Government had disclosed unwillingness or inability to carry out the agreement which it had proposed, one difficulty after another being raised for postponement of the ships for Swiss relief, and that,

> "Although the reason was never formally expressed, it was generally known that the Dutch ship owners feared lest their ships should be destroyed by German submarines, even though on an errand of mercy, and though not traversing any of the so-called danger zones proclaimed by the German Government;"

that as to those for Belgian relief the Dutch Government said that the German Government had notified it that it would forcibly prevent the departure from Holland of the corresponding ships, and the Dutch Government even felt unable to secure the two cargoes of foodstuffs which the agreement permitted, since the German Government threatened to destroy the equivalent of Dutch tonnage which was to leave Holland for the United States. The President made other concessions for the Dutch Government.

The *Staats Courant* of the Dutch Government, March 30, 1918, claimed that the President's statements were inaccurate. Apparently it had confused the proposition for temporary use of the Dutch ships with the main proposition for our use of them.

Mr. Lansing reviews the Dutch complaints and remarks that it was our right to requisition the ships immediately on outbreak of war April 6, 1917, but that we refrained in the hope of reaching an agreement with Holland concerning their use. The Dutch Government, through Dr. Louden, Foreign Minister, and once Holland's minister at Washington, stoutly maintained its position, but it is difficult to understand how it could have done so with a relish, because it was not only will-

ing that we use the ships, but had agreed with us upon the terms for such use, and declined to fulfill the agreement solely because of Germany's protest, and international law clearly gave us the right to requisition the ships. Also Holland needed the cargoes which the ships would carry to her.

The President, as we have seen, said that his action was "In accordance with international law and practice" and he proclaimed pursuant thereto that "The imperative military needs of the United States require the immediate utilization of" the ships then in our harbors, and the Navy was authorized to use them as necessary for essential purposes in the prosecution of the war, and the shipping board was required to make the owners full compensation.

It thus appears that every requisite to the right to execute the seizure existed, and the right was undoubtedly sustained by international law.

During the war persons and property of neutrals residing in a belligerent state are subject to such exceptional measures as the exigencies of war render necessary, provided no unjust discrimination is made between subjects and foreigners.[38] Taylor treats the principle under the Law of Angary.

He further says:

> "As a recognition of the fact that neutral property, accidentally or temporarily within the theatre of war, is entitled to special consideration, occupying belligerents have recognized the duty of making just compensation for its appropriation. The right of a belligerent to use such property, or even to destroy it when necessary, subject to liability for just compensation, is called *le droit d'angarie* or *Angaria,* a term which has been Anglicized into Angary."

Phillimore says:

> "It is an act of the state, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State are seized upon, and compelled to transport soldiers, ammunition or other instruments of war; in other words, to become parties against their will to carry-

[38] See also U. S. Naval War Code, 1900, Art. 6, p. 36; The Freedom of the Seas, by *Chas. Stewart Davison,* p. 82; HANNIS TAYLOR, INT. PUB. LAW, p. 701.

> ing on trade hostilities against a power with whom they are at peace. The owners of these vessels receive payment for freight before hand. Such a measure is not without the sanction of practice and usage, and approbation of many good writers upon international law."

The author cites various authorities, and invokes precedents including the seizure of 600 or 700 railway carriages belonging to the Central Swiss Railway, and Austrian rolling stock, for military purposes by the German authorities of Alsace, and the sinking of British merchantmen in the *Seine au Duclair* to prevent French gunboats navigating the river. These precedents are given as most recent instances of the exercise of the right.

The learned editor of the American Journal of International Law,[39] James Brown Scott, Esq., in justification of our President's action cites *Het International Maritiem Recht,* 1888, by a distinguished Dutch publicist, Gen. J. C. C. den Beer Poortugael, a Dutch official and representative to both Hague Conferences; and he says that Count von Bismarck applied it in the Franco-Prussian war. The Dutch publicist says:

> "The right of seizure (*ius angaria droit d'angarie,* admiralty right of prestation) is that right which according to many, a belligerent state has in case of extreme necessity for self preservation, to seize for its own use, the property, that is to say, the ships of neutrals."

To the contention that the neutral, in consenting, violates neutrality the Dutchman responds:

> "Whenever a belligerent, compelled by necessity, seizes upon that which he finds ready to hand, takes possession of it as he sees fit and assumes full liability for all damages, then the offense against neutrality disappears because it is no longer the neutral, but the belligerent who performs the services."

Gen. den Beer invokes the precedent of the Germans sinking the English ships, just mentioned, and Bismarck's courteous justification of it in his letter to the British Government. Dr. Scott says:

"In view of the imposing array of authority cited by Dr.

[39] Vol. 12, No. 2, April, 1918, p. 352.

> Erich Albrecht in his brochure entitled *Requisition of Private Neutral Property, Especially Ships,* published in 1912, its existence cannot be successfully denied—it is, of course, for the belligerent to determine when it shall exercise the right. This the United States has done and has complied with Gen. den Beer's requirements which are also requirements of international law."

Dr. Scott further cites "the greatest publicist of the 18th century * * * and the greatest of Dutch publicists, and indeed of all international lawyers,"—Vattel; and he cites Grotius. Dr. Scott notes the President did not elaborate his statement of the right to seize the Dutch ships and concludes:

> "Necessity is not invoked to create the law; it is only stated to justify the exercise of the right in accordance with the letter and the spirit of the law."

Our position is further sustained by Phillipson,[40] where the law of Angary is discussed. In addition to the precedent hereinbefore cited, he mentions the impressment by Great Britain at the outbreak of the war of four large warships in British Dockyards, uncompleted, destined for Chile and Turkey, then neutral. The Sublime Porte protested, but Great Britain justified its acts.

Our Submarine Controversy with Germany.

At the outbreak of war, in 1914, the German Navy was active all over the world, but the British Navy soon virtually cleared the seas of it, and Germany raised a wail over our selling arms and munitions to the Entente Allies. The Kaiser had so relied upon our German-American citizens, whom he regarded as still his subjects, that he had not suspected that they would permit us to sell his enemies arms and munitions nor, probably, anything whatever. A German baron, slapping his chest decorations until the junk rattled, told Gerard that the acts of our people in making such sales sunk deep into the German heart. Really Germany herself was purchasing war supplies here at the outset while complaining of British and French purchases, but the difference soon developed that the latter

[40] Int. Law and the Great War, p. 71.

could land the goods, while Germany could not; hence Germany grew very bitter toward us.

Finally, Germany, in desperation, instituted her submarine warfare as the only means of reaching British-American shipping, and our quarrel with Germany began in earnest. Of course, we were right and Germany wrong, as we only exercised the undoubted rights under international law previously recognized by all countries, including Germany, while Germany had purposely embarked upon a career of conquest, pillage and plunder, after a cruel education of her people for nearly half a century in the lust for loot. It was not surprising, therefore, that she deliberately discarded all rules of international law built up for centuries by really civilized nations, tending invariably toward the betterment of the human race and toward humanity, and voluntarily returned to the methods of savagery, imposing tribute upon conquered territory, exporting its inhabitants, men and women, into slavery, sacking its towns and villages in pursuance of a foreordained course of frightfulness, its motto being that not only must the armies of its foe in the field be overcome, but the morale of the civil population destroyed by terrorism. The Kaiser's plan was to subjugate and incorporate the peoples and wealth of the world. Accordingly, he informed our Ambassador, Mr. Gerard, who urged that our position on the submarine atrocities was according to international law and the German position against it, that there was no longer any international law,—meaning, doubtless, that he, the Kaiser, was to be the law-giver and, therefore, subject to no law. I say, therefore, advisedly, that, "of course," we were right and Germany wrong in the doctrines propounded.

In our quarrel over sale of munitions to Germany's foes we but followed precedents set by Germany herself, (as well as by other nations) when she sold munitions to the Boers, and to the Balkan belligerents. Dr. Dernberg, one of the most wily sophists that ever undertook to discuss international law, expressly disclaimed, in controversy with a distinguished American jurist, Dr. Charles Noble Gregory, that the German Government had formally protested against the sale to her foes of arms and

munitions.[41] He knew that position could not be maintained.

If a belligerent were barred from buying war materials upon outbreak of war, then all governments must provide them in advance, so that in times of peace the utmost farthing must be wrung from the fruits of labor to buy armament which may never be needed and is rapidly becoming scrap because of new inventions.

At the beginning of the war our Government notified the German Government:

> "A merchant vessel of belligerent nationality may carry armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war."

This was responsive to the German protest against our refusal to interne British liners entering and leaving New York with guns mounted. We declined to depart from this position but notified Germany that to avoid any ground of complaint we had disapproved of the use of our ports by British armed vessels, and that only two had entered an American port since December, 1914. After the sinking of the Persia, and the drowning of our Consul at Aden, Robert McNeely, Esquire, Mr. Lansing suggested the disarmament of merchant vessels to assure the safety of their passengers and crew if attacked, but nothing came of this proposal. Germany's announcement that all armed merchant vessels would be sunk without warning brought the issue squarely before our Government, and on February 18, 1916, a resolution was offered in our Senate to acquiesce in Germany's demand. The same issue arose in the House. It was proposed that our citizens be warned off armed merchantmen, but the President refused (February 24, 1916) to assent to such abridgment of the rights of our citizens. He urged an early vote on the resolutions. His demand for it came on the eve of the date set by the Teutonic powers for inaugurating their submarine war on armed merchantmen, March 1, 1916. The Senate's resolution, as modified, was defeated March 3, 1916, by 63 to 14 votes.

Meanwhile the delayed vote on the House resolution resulted

[41] Am. Journ. Int. Law, July, 1916.

March 7th, adversely by 276 to 133. Thereupon Secretary Lansing notified Germany that we recognized that if an armed merchantman used its armament to attack a submarine, the latter could not be expected to give warning since it would imperil the safety of boat and crew, but that each case must be judged on its merits and that only a belligerent ship which had been proved guilty of an offensive could be regarded as a war ship, and that the presence of armament alone did not raise the presumption of hostility.

The Teutonic submarines promptly sank four vessels having Americans on board, some of whom were injured. The sinking of one of them, the Sussex, provoked a final clash between us and Germany. It was a channel ferry-boat plying between Folkstone and Dieppe. While near Dieppe March 24, 1916, with 436 persons, including 75 Americans, on board, a submarine struck her with a torpedo. About 50 persons were lost and three Americans hurt. Mr. Lansing instructed Mr. Gerard to ascertain whether or not the Sussex was struck by a submarine. Berlin made unofficial denials but declined to officially deny or explain until she had received reports from all submarines operating off the French coast. We waived discussion, and placed the burden of proof on Germany. She first said that the Sussex had struck a British mine, but this was promptly disproved. For eleven days Berlin preserved a spirit of ignorance, but the seriousness with which the case was viewed in America, and our instructions to Mr. Gerard, finally caused Germany to call on the Admiralty for a report, and on April 10 she informed us that the fullest investigation had been had and that no German submarine attacked the Sussex, *but that one had torpedoed another vessel in the same place and destroyed it.* Again, the charge of a British mine was made, and Germany's note concluded:

> "Should the American Government have at its disposal further material for a conclusion upon the case of the Sussex the German Goverment would ask that it be communicated in order to subject the material also to investigation. In the event that difference of opinion should develop between the two governments the German Government now declares itself ready to have the facts of the case estab-

lished through mixed commissions of investigation in accordance with the third title of the Hague Agreement for the peaceful settlement of international conflicts, November 18, 1907."

Germany was unable to explain the fate of one of the four lost vessels, but claimed that two of them were attacked while attempting to escape.

On April 19, 1916, the President informed Congress that he had notified Germany that

"Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passenger and freight carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Government altogether."

The President sent a similar note to Berlin the same day. Secretary Lansing informed the German Government that its position concerning the Sussex was disproved. The German Government delayed reply for 15 days and then admitted the possibility that the torpedoed ship was the Sussex, and yielded to the American demand concerning her method of submarine warfare, and said:

"In accordance with the general purpose of visit and search and the destruction of merchant vessels recognized by international law, such vessels both within and without the area declared a naval war zone, shall not be sunk without warning and without saving human lives, unless the ships attempt to escape or offer resistance."

After, however, repeating its plea that our Government aid in restoring the "freedom of the seas," the note continued:

"Accordingly the German Government is confident that in consequence of the new orders issued to the naval forces the Government of the United States will also now consider all impediments removed which may have been in the way of the mutual coöperation of trade restoration of the freedom of the seas during the war as suggested in the note of July 23, 1915, and it does not doubt that the Government of the United States will now demand and insist that the British Government shall forthwith preserve the

rules of international law universally recognized before the war as they are laid down in the notes presented by the Government of the United States to the British Government, December 28, 1914, and November 5, 1915. Should steps taken by the Government of the United States not attain the object it desires, to have the laws of humanity followed by all belligerent nations, the German Government would then be facing a new situation in which it must reserve to itself complete liberty of decision."

We responded three days later, and after treating the German note as an abandonment of its submarine policy, said:

"The Government of the United States feels it necessary to state that it takes for granted that the Imperial German Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent government notwithstanding the fact that certain passages in the Imperial Government's note of the 4th inst. might appear to be susceptible to that construction.

"In order, however, to avoid any possible misunderstanding the Government of the United States notifies the Imperial Government that it cannot for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for rights of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other government affecting the rights of neutrals, and noncombatants. Responsibility in such matters is single, not joint, absolute, not relative."

On May 8, 1916, Germany sent a further note virtually confessing that the Sussex had been torpedoed by a German submarine, saying that the submarine had mistaken it for a British transport; and promised to pay an adequate indemnity to the injured American citizens, and said that the submarine commander had been properly punished.

After the submarine controversy ended temporarily Germany hoped to use us to embarrass the Entente Allies. This appears in her last note as just quoted. Also she expressed the hope of this to Mr. Gerard.

On January 31, 1917, the German Ambassador, Count von

Bernstorff, notified our State Department that since Germany's offer of peace negotiations had been refused by the Allied Governments, his Government

> "Is now compelled to continue the fight for existence again forced upon it, with a full employment of all weapons which are at its disposal."

The memorandum of conditions upon which regular passenger steamers might continue undisturbed accompanied the note. These conditions were most humiliating to us. They declared what kind and how many vessels might carry our commerce, and prescribed ridiculous marks for their supposed identification. In brief, Germany assumed proprietorship of the ocean and offered to permit us to use it upon her terms. Accompanying the German note was a second *memorandum,* declaring that because of the Entente's disregard of international law and determination to destroy the Central Powers the United States would understand that while Germany had not so far made unrestricted use of the power of her submarines, she was unable further to forego the full use thereof, and that the United States would further realize that now an openly disclosed intention of the Entente Allies to destroy the Central Powers, "Gives back to Germany the freedom of action which she reserved in her note addressed to the Government of the United States on May 4, 1916."

It thus appeared that while it suited the convenience of Germany in April and May, 1916, to keep the United States out of the war she promised to abandon her existing submarine policy, but her intent evidently was to resume it remorselessly when it pleased her. This was notwithstanding her declaration at the time that the merchantmen should not be sunk without warning and without saving human life unless in an attempt to escape or offer resistence, such being "In accordance with the general purpose of visit and search and the destruction of merchant vessels recognized by international law."

In his note of January 31, 1917, Count von Bernstorff added that Germany would forcibly prevent all navigation, even that of neutrals, within the specified zone, and concluded:

> "All ships met within that zone will be sunk. The Imperial Government is confident that this measure will result in a speedy termination of the war and in the restoration of peace, which the Government of the United States has so much at heart."

From this satire appears the German determination to simply disregard all international law to such an extent as it pleased, and, when the time suited, to throw off all restraint and embark upon an unrestrained career of destruction of life and property, and that it be so thorough as to subjugate her foes and to defy the United States and other neutrals.

Our response was to hand the Count and his official staff their passports February 3, 1917, and the President read his address to Congress which was enthusiastically and almost universally commended. The Senate on February 7th, by a vote of 78 to 5, approved the President's action, and on the same day the first passenger steamer after the German edict, the California, fell a victim to the German programme, and five persons were killed and thirty-six others drowned, including three women and two children. The President's position was upheld even by a large majority of the German-Americans. The day diplomatic relations with Germany were severed our steamer Housantanic was sunk after warning given, all on board being saved, and the loss of others followed [42] Germany made tentative proposals through the Swiss minister to reopen negotiations with us, but her overtures were bluntly rejected.

On February 26th, the President appeared before a joint session of Congress and asked authority to use the armed forces of the United States to protect American rights on the seas; and effect was added to his appeal by the news, received while he was on the way to the Capitol, of the destruction of the Laconia. About the same time the Zimmerman note, dated January 19, 1917, was made public. The President, on March 9th, called Congress for April 16, but the submarines continuing to sink American vessels and vessels having Americans aboard, and the President finding a state of armed neutrality inadequate to meet the situation, after a Cabinet meeting, March 20th, is-

[42] The New Year Book, 1917, p. 710.

sued a call next day for Congress to assemble April 2d, and then asked authority to declare war, which was promptly granted by the Senate, April 4th, by a vote of 86 to 6. The Resolution was taken to the House which passed it April 6th, by vote of 373 to 50.

In view of the history of Germany's forcing the war, her methods of warfare, her admissions in correspondence with us, her repudiation of the existence of international law in the interview with our ambassador, and the history of international law for centuries, it might seem difficult to treat seriously Germany's pretensions of right under international law to declare a war zone and sink all belligerent or neutral merchant ships entering it without warning or adopting measures to save passengers or crew.

International law is defined by Blackstone [43]

> "As a system of rules deducible by natural reason and established by universal consent among the civilized inhabitants of the world, in order to decide disputes, regulate ceremonies and civilities and insure the observances of justice and good faith in their mutual intercourse. This general law is founded upon the principle that different nations ought in time of peace to do one another all the good they can, and in time of war as littlt harm as possible without prejudice to their own real interests * * *
>
> "International law is part of the universal law of reason, justice and conscience."

The tendency of international law has been for generations, if not virtually always since its inception, toward humanity and the amelioration of the horrors of war. In its course of development, the duty (right) of visit and search and of saving passengers and crew have become thoroughly established.[44]

The right to destroy even a belligerent merchantman, exists under international law only when the captor is unable to

[43] 1 BL. COM. C. XIV 43; Wilson *v.* McNamee, 102 U. S. 572, 574. See also Sugar *v.* Boyle, 9 Cranch 191, 198; Anderson's Law Dict. 696.

[44] Taylor, §§ 557, 685, *et seq.*, and citations; Naval War Code, 1900, Sec. V., Art. 30, p. 109; Art. 32, p. 110; Arts. 46 to 50, p. 114; *ibid*, 1905, p. 48; Anderson's Law Dict., p. 929, Title Search, and cases cited; Phillipson, p. 360, and cases cited.

carry his prize into port, and in such case of destruction the crew and passengers must be made safe.

In The Lusitania,[45] a Northern Judge, (Hon. Julius M. Mayer, U. S. District Judge, N. Y.,) expounding the rules for humanity embodied in the laws of nations, and citing Oppenheim, Vattel and the U. S. White Book, said:

> "These humane principles were practiced both in the War of 1812 and during our own war of 1861-65. Even with all the bitterness (now happily ended and forgotten) and all the difficulties of having no port to which to send a prize, Capt. Semmes, of the Alabama, strictly observed the rule as to human life, even going so far as to release ships because he could not care for the passengers."

Briefly, the Confederate Admiralty confronted with the dilemma of losing their prizes or sacrificing human life courageously accepted the former alternative, and certainly the Kaiser could not claim that his government was in direr straits than was the Confederate Government. The difference was that between man and brute!

Judge Mayer, in The Lusitania, cites ample authority to condemn the course of the German Government in its submarine warfare. He quotes Oppenheim as follows:

> "(12) To attack an enemy merchantmen without previous request to submit to visit"

is among violations of the rules of war.

He also quotes Vattel, as follows:

> "Let us never forget that our enemies are men. Though reduced to the disagreeable necessity of prosecuting our right by force of arms, let us not divest ourselves of that charity which connects us with all mankind. Thus shall we courageously defend our country's rights without violating those of human nature. Let our valor preserve itself from every stain of cruelty and the lustre of victory will not be tarnished by inhuman and brutal actions."

---

[45] 251 Fed. 715.

Our White Book is quoted: [46]

"(10) In the case of an enemy merchantman, it may be sunk, but only if it is impossible to take it into port, and provided always that the persons on board are put in a place of safety."

When we note that Vattel wrote in 1758 and that our White Book was issued in the last war, we realize what progress international law had made a century and a half ago, and how consistently the usages of really civilized nations had progressed; and when we compare the remorseless brutality of the German submarine warfare maintained in defiance of all law, of humanity and of the progress of civilization, solely to meet the exigencies of a cruel war deliberately forced by Germany, the indictment is sustained that she deliberately returned to the methods of barbarism in the campaign for subjugating and despoiling the other countries of the world.

Had we acquiesced in the Kaiser's orders, to keep off the sea, or sailed in a boat painted according to his requirements, and pursuant to a schedule promulgated by him, then we should have recognized his dominion and our own dependency, and our sovereignty would have been voluntarily surrendered. Germany was so foolhardy as to leave us no alternative but to fight, and our advent upon the field meant the end of Kaiserdom for Germany.

Judge Mayer remarks: [47]

"The German Government found itself compelled ultimately to recognize the principle insisted upon by the Government of the United States, for, after considerable correspondence, and on May 4, 1916, (after the Sussex had been sunk) the German government said:

" 'The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law; the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the

[46] U. S. White Book, European War, No. 3, p. 192.
[47] The Lusitania, *supra*.

war zone surrounding Great Britain * * * The German Government guided by this idea, notifies the Government of the United States that the German naval forces have received the following orders:

"'In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.'"

Phillipson, (p. 360), says:

"If the prize taken is an enemy vessel and cargo, the captor is entitled, according to a generally accepted rule of international law, to destroy her, provided she is in such a condition as to render navigation dangerous, or that it is unsafe to take her into port on account of the proximity of the enemy, or owing to other circumstances that might seriously jeopardize the captor. However, when insuperable necessity dictates destruction, the crew and the ship's papers must first be removed."

Citation of authority on so well established a principle seems supererogatory, for Germany herself, as pointed out by Judge Mayer, not only confessed, but recited, the principle in most accurate terms.

Judge Mayer, also, quotes the German Prize Code in force at the time of The Lusitania massacre, as follows:

"Before proceeding to a destruction of the vessel, the safety of all persons on board and, so far as possible, their effects, is to be provided for, and all ships' papers and other evidentiary material, which, according to the views of the persons at interest, is of value for the formulation of the judgment of the prize court, are to be taken over by the commander."

Not only, then, were the rights of vessels, passengers and crew, well settled when the war began, but Germany's Code was in accordance therewith, and the explanation of the savagery of her course is only to be accounted for upon the theory expressed by the Kaiser to Ambassador Gerard: "Besides there is no more international law."

Some apologists for Germany suggest that inasmuch as the

submarine cannot comply with the requirements of visit and search, they may be omitted, because laws must progress, and therefore, change to meet new conditions arising out of new inventions; but the obvious answer is two-fold: First—That Germany, in response to the note on the destruction of the Sussex, recited its Naval Code *as still in force* and said that her naval commanders had been ordered to conform to it; and, Secondly—If a new invention for destruction of human life is such that it cannot be employed except in violation of law, the invention, and not the law, must go. What would be thought of any other criminal who would offer such a plea? Evidently, exactly what the world thinks of Germany, and probably she thinks of herself today. The fate of Germany's experience in World conquest is a great lesson, the influence of which it is hoped may never be forgotten.

Edmund F. Trabue.

LOUISVILLE, KY.